



Priority ☒
Send ☒
Enter ☒
Closed ☐
JS-5/JS-6 ☐
JS-2/JS-3 ☐
Scan Only ☐

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FEDERAL TRADE COMMISSION,
Plaintiff,
vs.

CASE NO. CV 03-3700 DT (PJWx)

**ORDER DENYING DEFENDANT
CHASE REVEL'S MOTION FOR
SUMMARY JUDGMENT OR
PARTIAL SUMMARY JUDGMENT**

A. GLENN BRASWELL, et al.,
Defendants.

I. BACKGROUND

A. Factual Summary

Plaintiff, the Federal Trade Commission ("FTC" or "Commission"), is an independent agency of the United States Government created by statute. 15 U.S.C. §§ 41-58. It brings this action against Defendants A. Glenn Braswell ("Braswell"), JOL Management Co. ("JOL"), G.B. Data Systems, Inc. ("G.B. Data"), Gero Vita International, Inc. ("Gero Vita"), Theraceuticals, Inc. ("Theraceuticals"), Halsey Holdings LLC ("Halsey"), Health Quest Publications, Inc. ("Health Quest"), G.B. Data Systems, Inc. (Canada), Ron Pepper ("Pepper"),

594

SCANNED

1 Ronald M. Lawrence, M.D., Ph.D. ("Lawrence"), Hans Kugler, Ph.D. ("Kugler"),
2 Chase Revel a/k/a Marcus Welbourne, John Wellburn, James Wellburn, Martin
3 Wellner, John Meggenhorn, and John Burke ("Revel").

4 The following facts are found to be undisputed¹:

5 On or about May 27, 2003, the FTC filed its original complaint
6 against Defendants for violations of Sections 5 and 12 of the Federal Trade
7 Commission Act ("FTC Act"). On or about March 30, 2004, the FTC sought leave
8 to add Revel as a defendant. On or about July 26, 2004, the FTC filed its Second
9 Corrected First Amended Complaint for Permanent Injunction and Other Equitable
10 Relief ("FAC").

11 The FTC alleges that Braswell, Tepper, JOL, G.B. Data, Canada,
12 Gero Vita, Theraceuticals, Health Quest, and Halsey are part of the "Braswell
13 Common Enterprise." The FTC does not allege that Revel is part of the Braswell
14 Common Enterprise. It alleges that the Braswell Common Enterprise "advertised,
15 labeled, offered for sale, sold, and distributed a variety of dietary supplements and
16 other health-related products to the public, and that its total sales exceeded \$798
17 million." Among the products that Defendants are alleged to have advertised,
18 labeled, offered for sale, sold and distributed in recent years are: Lung Support
19 Formula, Gero Vita G.H.3, and Testrex, all marketed since at least 1998;
20 ChitoPlex, marketed since at least 1999; AntiBetic Pancreas Tonic, marketed since
21 at least 2000; and Theraceuticals G.H.3 Romanian Youth Formula, marketed since

22
23 ¹ The Court sets forth these facts based on its review of Revel's Statement of
24 Uncontroverted Facts and Conclusions of Law, the FTC's Statement of Genuine
25 Issues and Revel's Reply Statement. While many facts were set forth in Revel's
26 Separate Statement in support of his Motion for Summary Judgment, the Court
27 sets forth only those undisputed facts relevant to the analysis set forth herein.
Other disputed facts are discussed within the analysis portion or were not relevant
based on the Court's determinations of the issues presented in this Motion.

1 at least 2001. The FTC has settled with all of the entities comprising the Braswell
2 Common Enterprise with the exception of Braswell individually.

3 Revel drafted advertising copy for the Gero Vita companies pursuant
4 to the contract between his company, Campaign Media Corporation ("CMC")² and
5 Vita Industries ("Contract"). CMC agreed to create advertising material for direct
6 mail or space advertising to promote Gero Vita's products. Under this Contract,
7 CMC was to receive royalty payments based on a percentage of the sales
8 generated by the advertising material created by CMC. Revel ceased working for
9 the Gero Vita companies in early 2001.

10 The FAC alleges three counts against Revel for the advertising he
11 wrote for Lung Support Formula, AntiBetic Pancreas Tonic and Gero Vita GH3.
12 Revel does not dispute that he wrote advertising for these products. The FAC
13 alleges that Revel made claims that Gero Vita products will "cure, treat, or
14 ~~alleviate" certain conditions; and that they have been "scientifically tested and~~
15 proven to be effective;" and that these representations violation Sections 5(a) and
16 12 of the FTC Act.

17 More specifically, with respect to the three product claims at issue
18 here, the FTC alleges the following in its FAC:

- 19 (1) Revel "represented, expressly or by implication, that Lung Support: a.
20 Cures or significantly alleviates lung diseases and respiratory
21 problems, including asthma, colds, influenza, bronchitis, chest
22 congestion, emphysema, smoking damage, and shortness of breath; b.
23 Reverses existing lung damage in persons with emphysema and
24 significantly improves their breathing; c. Prevents breathing problems
25 for many persons who do not have existing respiratory problems; and

26
27 ² CMC later became Admax, Inc.

SCANNED

d. Is clinically proven to eliminate or cure allergies, asthma, colds, influenza, bronchitis, sinus problems, chest congestions, emphysema, smoking damage, and shortness of breath.”

(2) Revel “represented, expressly or by implication, that AntiBetic: a. Can cure Type I and Type II diabetes; b. is an effective or superior alternative to insulin or other diabetes medications for the treatment of Type I and Type II diabetes; and c. is clinically proven to regenerate or repair the pancreatic cells that produce insulin and to lower blood sugar levels in persons with diabetes.”

(3) Revel “represented, expressly or by implication, that: a. GH3 reverses and prevents age-related memory loss, dementia, and Alzheimer’s disease; b. Persons who use GH3 or Theraceuticals GH3 can live 29% longer; and c. GH3 is clinically proven to prevent and reverse age-related memory loss, dementia and Alzheimer’s disease.”

The FTC alleges that the above-stated representations regarding Lung Support, Antibetic and the GH3 Products (“Representations”) were made “expressly or by implication” and that they were “false or were not substantiated at the time [they] were made.” The FTC contends that the “overall net impression” of Revel’s advertisements convey such Representations.

B. Procedural Summary

The procedural history in this case is lengthy, as the original Complaint was filed on May 27, 2003, and it has been set out in previous orders of this Court. This Court hereby incorporates by reference the Procedural Histories set forth in prior Orders of this Court.

Currently before this Court is Defendant Chase Revel’s Motion for Summary Judgment or Partial Summary Judgment, filed on August 29, 2005.

1 II. DISCUSSION

2 A. Standard

3 Under the Federal Rules of Civil Procedure, summary judgment is
4 proper only where "the pleadings, depositions, answers to interrogatories, and
5 admissions on file, together with the affidavits, if any, show that there is no
6 genuine issue as to any material fact and that the moving party is entitled to a
7 judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party has the
8 burden of demonstrating the absence of a genuine issue of fact for trial. See
9 Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256, 106 S. Ct. 2505, 2514 (1986).
10 If the moving party satisfies the burden, the party opposing the motion must set
11 forth specific facts showing that there remains a genuine issue for trial. See id.;
12 Fed. R. Civ. P. 56(e).

13 A non-moving party who bears the burden of proof at trial to an
14 ~~element essential to its case must make a showing sufficient to establish a genuine~~
15 dispute of fact with respect to the existence of that element of the case or be
16 subject to summary judgment. See Celotex Corp. v. Catrett, 477 U.S. 317, 322,
17 106 S. Ct. 2548, 2552 (1986). Such an issue of fact is a genuine issue if it
18 reasonably can be resolved in favor of either party. See Anderson, 477 U.S. at
19 250-51, 106 S. Ct. at 2511. The non-movant's burden to demonstrate a genuine
20 issue of material fact increases when the factual context renders her claim
21 implausible. See Matsushita Electric Industrial Co. v. Zenith Radio Corp., 475
22 U.S. 574, 587, 106 S. Ct. 1348, 1356 (1986). Thus, mere disagreement or the bald
23 assertion that a genuine issue of material fact exists no longer precludes the use of
24 summary judgment. See Harper v. Wallingford, 877 F.2d 728 (9th Cir. 1989);
25 California Architectural Building Prods., Inc. v. Franciscan Ceramics, Inc., 818
26 F.2d 1466, 1468 (9th Cir. 1987).

SCANNED

1 If the moving party seeks summary judgment on a claim or defense on
2 which it bears the burden of proof at trial, it must satisfy its burden by showing
3 affirmative, admissible evidence.

4 Unauthenticated documents cannot be considered on a motion for
5 summary judgment. See Hal Roach Studios v. Richard Feiner and Co., 896 F.2d
6 1542, 1550 (9th Cir. 1990).

7 On a motion for summary judgment, admissible declarations or
8 affidavits must be based on personal knowledge, must set forth facts that would be
9 admissible evidence at trial, and must show that the declarant or affiant is
10 competent to testify as to the facts at issue. See Fed. R. Civ. P. 56(e).

11 Declarations on "information and belief" are inappropriate to demonstrate a
12 genuine issue of fact. See Taylor v. List, 880 F.2d 1040, 1045 (9th Cir. 1989).

13 **B. Analysis**

14 ~~Revel seeks judgment or partial judgment as a matter of law on the~~
15 following bases:

- 16 (1) The FTC cannot meet its burden of proving that any advertisements
17 drafted by Revel contained statements that were expressly false or
18 deceptive or created a net impression that was false or deceptive;
- 19 (2) The FTC cannot meet its burden of proving that Revel lacked a
20 reasonable basis for all statements made in advertising copy drafted
21 by him regarding the products at issue in this case;
- 22 (3) The FTC cannot meet its burden of demonstrating the proper
23 calculation of any restitution award against Revel regarding Lung
24 Support Formula;
- 25 (4) The FTC cannot meet its burden of demonstrating that Revel should
26 be subject to any injunctive relief;

SCANNED

(5) Revel has demonstrated that he acted in good faith in drafting the advertisements for Lung Support Formula, GH3 and AntiBetic.

1. Applicable standards for Sections 5 and 12 of the FTC Act

As set forth above, the FTC alleges that the advertisements drafted by Revel with respect to Lung Support Formula, GH3 and Antibetic contain representations which are false or were not substantiated at the time they were made, constituting a deceptive practice, and the making of false advertisements in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.

Section 5 of the FTC Act declares unlawful “unfair methods of competition in or affecting commerce, and unfair and deceptive acts or practices in or affecting commerce.”

In support of his Motion, Revel argues that the FTC must meet its burden of demonstrating “substantial consumer injury” as set forth in 15 U.S.C. § 45(n).³ However, the FTC responds that such a showing is the liability standard for “unfair practices,” and it alleges “deceptive”, not “unfair” practices. See Complaint at ¶¶ 36, 38, 40, 44 (“Therefore, the making of the representations . . . constitutes a deceptive practice, and the making of false advertisements, in or affecting commerce, in violation of Sections 5(a) and 12 of the FTC Act, 15 U.S.C. §§ 45(a) and 52.”) This Court agrees with the FTC.

“[T]he ‘cardinal factor’ in determining whether an act or practice is deceptive under § 5 is the likely effect the promoter’s handiwork will have on the

³ Under § 45(n), an act or practice cannot be declared unlawful on the grounds that such act or practice is unfair unless the act or practice “causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits to consumers or to competition.” 15 U.S.C. § 45(n).

SCANNED

1 mind of the ordinary consumer.” Federal Trade Comm’n v. Sterling Drug, Inc.,
 2 317 F.2d 669, 674 (2d Cir. 1963). Under Section 5, the FTC must show that the
 3 business entity made material representations likely to mislead ordinary consumers
 4 to their detriment. F.T.C. v. Freecom Communications, Inc., 401 F.3d 1192, 1203
 5 (10th Cir. 2005); see also Southwest Sunsites, Inc. v. Federal Trade Comm’n, 785
 6 F.2d 1431, 1436 (9th Cir. 1986). Proof of consumer reliance or consumer injury is
 7 not necessary to establish a Section 5 violation. Freecom, 401 F.3d at 1203. As
 8 such, the FTC’s burden of proof does not include “substantial consumer injury.”⁴

9 Section 12 of the Act makes it unlawful “to disseminate, or cause to
 10 be disseminated, any false advertisement (1) by United States mails, in or having
 11 an effect upon commerce, by any means, for the purpose of inducing, or which is
 12 likely to induce, directly or indirectly the purchase of food, drugs, devices,
 13 services, or cosmetics; or (2) by any means, for the purpose of inducing, or which
 14 is likely to induce, directly or indirectly, the purchase in or having an effect upon
 15 commerce, of food, drugs, devices, services, or cosmetics.” 15 U.S.C. § 52(a). A
 16 “false advertisement” is any advertisement that is misleading in a material respect.
 17 15 U.S.C. § 55; see also F.T.C. v. Pantron I Corp., 33 F.3d 1088, 1099 (9th Cir.
 18 1994)(“Indeed, a ‘false advertisement’ need not be ‘false’; it need only be
 19 ‘misleading in a material respect.’”). In determining whether any advertisement is
 20 false or misleading, the Court must take “into account, among other things, not
 21

22 ⁴ In his Reply, Revel admits that “the Commission is correct that it may
 23 establish a technical violation of the FTC Act without proof of consumer injury.”
 24 However, he contends “the consequences of such a showing are virtually
 25 meaningless for the purposes of the FTC’s case against Revel.” He argues that
 26 because the only monetary relief that the FTC seeks from Revel is restitution
 27 based on injury to consumers, then the FTC still needs to prove “injury to
 28 consumers.” However, as explained hereinbelow, triable issues of fact exist with
 respect to the issue of restitution.

SCANNED

1 only representations made or suggested by statement, word, design, device, sound,
2 or any combination thereof, but also the extent to which the advertisement fails to
3 reveal facts material in the light of such representations.” 15 U.S.C. § 55.

4 **2. Summary judgment is not warranted on the basis of the net**
5 **impressions of the advertisements**

6 The FTC’s allegations against Revel are based on claims derived
7 from the net impressions created by the challenged advertisements written by
8 Revel for Defendant Braswell and his companies. Based on the FTC’s allegations,
9 then, the question is whether the net impression of the representation is such that
10 the representation would be likely to mislead reasonable consumers. FTC v. Gill,
11 71 F. Supp. 2d 1030, 1046 (C.D. Cal. 1999).

12 In seeking summary judgment, Revel argues that the FTC cannot
13 meet its burden of proving that any advertisements drafted by him contained
14 ~~statements that created a net impression that was false or deceptive. He contends~~
15 that his drafted advertisements contain appropriate qualifying language, and that
16 the ads clearly describe the type of studies that are being relied on. In opposition,
17 the FTC argues that there are genuine issues of fact regarding the falsity of the net
18 impression claims conveyed by Revel’s advertisements. This Court agrees with
19 the FTC. In other words, a reasonable trier of fact could determine that the net
20 impression of the representations in Revel’s advertisements is such that the
21 representations would be likely to mislead reasonable consumers.

22 At the outset, this Court notes that contrary to Revel’s arguments,
23 individual statements need not be false or misleading to render a net impression
24 false or misleading. See Sterling Drug, 317 F.2d at 675 (“The courts are no longer
25 content to insist simply upon the ‘most literal truthfulness’ for we have
26 increasingly come to recognize that ‘Advertisements as a whole may be
27
28

1 completely misleading although every sentence separately considered is literally
2 true.” (citations omitted)); FTC v. Arlington Press, Inc., 1999 WL 33562452 *9
3 (C.D. Cal. 1999)(“Even if literally true, a representation will be found to be
4 deceptive and in violation of Section 5 of the FTCA if its net impression is likely
5 to mislead consumers.”). As such, this Court views the representations alleged to
6 be made by the advertisements and determines whether the fact finder could
7 determine that its net impression is likely to mislead consumers.

8 **a. Lung Support Formula advertisement**

9 The claims that the FTC alleges are made by this advertisement (see
10 Koehler Decl., Exh. 1) are that Lung Support Formula: (1) cures or significantly
11 alleviates lung diseases and respiratory problems, including asthma, colds,
12 influenza, bronchitis, chest congestion, emphysema, smoking damage, and
13 shortness of breath; (2) reverses existing lung damage in persons with emphysema
14 and significantly improves their breathing; (3) prevents breathing problems for
15 many persons who do not have existing respiratory problems; and (4) is clinically
16 proven to eliminate or cure asthma, colds, influenza, bronchitis, and emphysema.
17 (FAC at ¶¶ 35-36.)

18 A review of the ad shows that the fact finder could determine that
19 these claims are conveyed, either expressly or impliedly. The ad claims on the
20 cover page that “Scientists Find Amazing Remedy for: Asthma, Bronchitis,
21 Emphysema and Smoking Damage.” The word “remedy” can communicate a
22 “significant alleviation” for those diseases. The majority of the ad concerns how
23 individual ingredients have been proven to cure or alleviate the symptoms of these
24 conditions and others, including colds, flu and shortness of breath. The claims are
25 reinforced by expert endorsements touting Lung Support as “scientifically proven
26
27
28

1 to rejuvenate the important lung function" (Weissman) and "proven" to rejuvenate
2 lungs (Kugler).

3 Regarding the claim that Lung Support reverses existing lung damage
4 in persons with emphysema and significantly improves their breathing, the ad
5 reports on a study where researchers reported that they "were able to reverse . . .
6 damage to the alveoli of animals" and emphasizes that "They actually
7 reversed emphysema!" In a conclusion, the ad claims: "It is obvious that asthma,
8 bronchitis, and now, even emphysema, are reversible or avoidable, if you feed the
9 body [Lung Support]."

10 Regarding the claim that Lung Support prevents breathing problems
11 for many persons who do not have existing respiratory problems, the ad conveys
12 this message through its discussion of the extreme dangers that air pollutants pose
13 to the respiratory system, particularly the destruction of fibers in the lungs.

14 ~~According to the ad, the ingredients in Lung Support deter damage to the lung,~~
15 thereby implying that Lung Support will prevent the development of breathing
16 problems.

17 The ad represents that Lung Support is clinically proven to eliminate
18 or cure asthma, colds, influenza, bronchitis, emphysema, and smoking damage. In
19 addition to the express representations on the cover page and the expert
20 endorsements, the ad develops this claim through the discussion of at least nine
21 scientific or clinical tests that purportedly support the efficacy of the ingredients
22 found in Lung Support.

23 Thus, this Court concludes that a fact finder could determine that the
24 express statements and the reasonable inference therefrom, in the context of the
25 advertisement as a whole, convey to reasonable consumers the claims regarding
26 Lung Support alleged by the FTC.

SCANNED

b. AntiBetic Pancreas Tonic advertisement

The claims that the FTC alleges are made by this advertisement (see Koehler Decl., Exh. 2) are that AntiBetic Pancreas Tonic: (1) can cure Type I and Type II diabetes; (2) is an effective or superior alternative to insulin or other diabetes medications for the treatment of Type I and Type II diabetes; and (3) is clinically proven to regenerate or repair the pancreatic cells that produce insulin and to lower blood sugar levels in persons with diabetes. (FAC at ¶¶ 37-38.)

A review of the ad shows that the fact finder could determine that these claims are conveyed, either expressly or impliedly. The substance of the ad is that the various ingredients in AntiBetic have been demonstrated through purported scientific tests to be effective in the regeneration of pancreatic cells that produce insulin or regulation of blood sugar levels. Regarding the implication that AntiBetic cures Type I and Type II diabetes, the ad states "Formula Can Eliminate the Need for Drugs"; "treatment can be discontinued after between about four and twelve months, for type I and type II diabetes"; "the formula will cure diabetes"; "clinical tests show that we've finally found the answer" (expert endorsement); and "wipe one of the worst diseases off the list" (expert endorsement).

Regarding the claim that AntiBetic is an effective or superior alternative to insulin or other diabetes medications for the treatment of Type I and Type II diabetes, the ad asserts that unlike AntiBetic, conventional treatments are dangerous and do not provide a cure for diabetes. The ad states:

Whether you are type I or type II diabetic, you know the drugs your doctor gives you aren't curing the disease; they are only trying to keep your system in balance so you can function and live. {bold subline: you never get better on drugs} Unfortunately, you never get better